UNITED STATES SUPREME COURT.

No. 1213.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, *et al.*,

Libellants and Appellees,

vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,

Claimant and Appellant.

PAPERS ON MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION.

EDWARD D. McCARTHY,
Proctor, Etc.
50 Wall Street, New York

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and twelfth.

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 224. The Steam Canal-Boat "Sydney," her engines, &c., and The Canal-Boat "William Worden," her tackle, &c., Charles E. Wager, claimant, appellant, *vs.* The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut. Filed October 13, 1887.

UNITED STATES SUPREME COURT.

No. 1213.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, *et al.*,

Libellants and Appellees,

vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,

Claimant and Appellant.

PAPERS ON MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION.

EDWARD D. McCARTHY,
Proctor, Etc.
50 Wall Street, New York

Supreme Court of the United States.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, of Providence, Rhode Island and THE SECURITY INSURANCE COMPANY, of New Haven, Connecticut,
Libellants and Appellees.

against

The Steam Canal Boat "SYDNEY," and the Canal Boat "WILLIAM WORDEN," whereof CHARLES E. WAGER is
Claimant and Appellant.

Sirs:—Take notice that on the libel claim of owner, answer, order for the sale of the steam canal boat "Sydney" her engines, &c., the Marshal's return under said order, the stipulation for the value of the canal boat "William Worden," her tackle &c., the final decree of the Circuit Court of the United States, for the Southern District of New York, the claimant's petition of appeal herein to this Court, and the order allowing the said appeal, copies of which are hereto annexed, I shall move this Court at a term thereof to be held in the United States Supreme Court room, in the city of

Washington, District of Columbia, on the 3d Monday of November next, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to dismiss the appeal of the claimant herein to this Court, for want of jurisdiction, on the ground that the actual amount or matter in dispute in this Court is less than $5,000.

October 28th, 1887.

EDWARD D. McCARTHY,
Proctor for Libellants and Appellees.

To HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant.

To the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York.

The libel and complaint of the Providence Washington Insurance Company of Providence, Rhode Island, and the Security Insurance Company, of New Haven Connecticut, against the steam canal boat "Sydney" and her consort, the canal boat "William Worden," and their tackle, apparel, etc., and against all persons lawfully intervening for their interests therein, in a cause of collision, civil and maritime, alleges as follows:

First.—Your libellants are foreign corporations, but carry on the business of general marine insurers in the State of New York, under the name and style of the New England Underwriters.

Second.—The aforesaid steam canal boat "Sydney" and her said consort, the "William Worden," are now in the harbor of New York, and within the jurisdiction of this Court.

Third.—That heretofore, to wit, on or about the 17th day of May, 1883, the said canal boat "Sydney" and her consort, the boat "William Worden," which then were and now are owned by the same persons, and which then were and now are engaged in the business of common carriers to and from the cities of New York and Buffalo by way of the Erie Canal and the Hudson river, left the port of Buffalo for the port of New York, having on board, with other merchandise, a cargo of wheat consisting of seven thousand nine hundred (7,900) bushels, and of the true and lawful value of $9,211.75, consigned to Armour, Plankinton & Company, of New York, the owners and consignees thereof.

These two boats were, and practically are, but one vessel, the boat "Sydney" being furnished with an engine and propeller and furnishing the motive power both for the other boat and herself, and the boat "Wm. Worden" being without masts, sails, or any motive power, and entirely dependent on the "Sydney" in navigation.

When this trip was begun, and during the partial performance of it, these two boats were fastened together, as is always the case when making a voyage. The stern of the "Worden" being fastened to the bows of the "Sydney" and pushed directly ahead by the "Sydney" and forming one vehicle some 200 feet in length.

Fourth.—The trip thus begun by these boats was carried on with comparative safety until Tuesday the 29th day of May, aforesaid, when the said boats run aground on an island in the Hudson river, called Esopus Island, whereby the boat "Worden" was so damaged that she almost immediately sank in deep water, and the cargo aforesaid which was on board the "Worden" became a total loss.

More particularly, Esopus Island is in the Hudson river, about midway between Poughkeepsie, on the north, Kingston, on the south.

At about ten o'clock in the night aforesaid, which was a clear and starlit night, through the gross carelessness of the person or persons in charge of the boats aforesaid, the "Worden" was driven upon the rocks on the north end of the island aforesaid, and was sunk.

Your libellants allege general mismanagement on the part of the persons in charge of the said boats. The island being a well-known obstruction easily to be avoided, a wide expanse of water on

either side, fit for navigation, protected by buoys, and a light house.

Fifth.—On the date above mentioned, to wit, the 17th day of May, 1883, your libellants did, by one certain policy of insurance, insure and agree to indemnify against loss, the aforesaid Armour, Plankinton & Company, the owners and consignees of the aforesaid cargo of wheat, against the usual marine risks and perils of the voyage from Buffalo to New York, and pursuant to the said policy of insurace, did on the occurrence of the loss and damage aforesaid, accept from the insured, Armour, Plankinton & Company, an abandonment of the said cargo, as for a total loss thereof, and thereupon did pay to the said insured, the true and lawful sum of $9,211.75, and thereby became subrogated to all the rights, claims and demands of the said Armour, Plankinton & Company, for the loss and damage aforesaid, against the said steam canal boat "Sydney" and her said consort, the canal boat "Wm. Worden," their owner or owners.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore your libellants pray that process in due form of law, according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said steam canal boat "Sydney," her tackle, engines, &c., and against the said canal boat "William Worden," her tackle, apparel and furniture, and that all persons having or claiming to have any right, title or interest in the same, may be cited to appear and answer on oath all and singular the matters aforesaid, and this Honorable Court would

be pleased to decree the payment of the claim aforesaid, with interest and costs, and that said vessels, their tackle, &c., may be condemned and sold to pay the same, and that your libellants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

Southern District of New York, ss.:

S. G. SMITH, being duly sworn, says, that he is an agent of the libellants herein, that he has read the foregoing libel, and the same is true; that the reason this verification is made by deponent and not by the libellants or either of them is that said libellants are foreign corporations and none of their officers are now within this district.

S. G. SMITH,

Sworn to before me this
12th day of July, 1883.

THOMAS J. DE LANEY,
[L. S.] *Notary Public*,
Kings County.

Cert. filed in N. Y. Co.

EDWARD D. McCARTHY,
Proctor for Appellents.

[Filed July 23rd, 1883].

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court Rooms in the city of New York, on Tuesday, the fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-three.

Present :

The Honorable ADDISON BROWN, District Judge.

PROVIDENCE WASHINGTON INSURANCE COMPANY, and another, *against* THE STEAM CANAL BOAT "SYDNEY," and her consort the canal boat "WILLIAM WORDEN."	31,127.

And now, CHARLES E. WAGER, sole owner of the said vessels, "Sydney" and "William Worden," intervening for the interest of himself in the said "Sydney" and "William Worden," appears before the Honorable Court and makes claim to the said vessels, &c., as the same are attached by the Marshal, under process of this Court, at the instance of Providence Washington Insurance Company and another, and the said Charles E. Wager avers that he was in possession of the said vessels at the time of the attachment thereof, and that the person above-named is the true and *bona fide* owner of the said vessels and that no other

person is the owner thereof; wherefore he prays to defend accordingly.

C. E. WAGER.

Sworn to and subscribed this fourteenth day of August, A. D., 1883, before me.

[SEAL.] DANIEL J. AUGUSTINE,
Notary Public,
N. Y. Co.

HYLAND & ZABRISKIE,
Proctors for Claimant.

Southern District of New York, ss.:

The President of the United States of America, to the Marshal of the Southern District of New York, *Greeting:*

[L. S.] Whereas, a libel was filed in the District Court of the United States for the Southern District of New York, on the 23d day of July, in the year of our Lord one thousand eight hundred and eighty-three, by

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*,

against

The Steam Canal Boat "SYDNEY," and the Canal Boat "WM. WORDEN," their Engines, &c.

Collision, $9,211.75.

and praying that the same may be condemned and

sold to pay the libellants the said amount. And whereas the said steam canal boat "Sydney," &c., has been attached by the process issued out of the said District Court in pursuance of the said libel, and is now in custody by virtue thereof; the canal boat "Worden" not found; and such proceedings have been thereupon had, that by the consent and order of the said Court in this cause made and pronounced, on the sixteenth day of August, one thousand eight hundred and eighty-three, the said steam canal boat "Sydney," her tackle, &c., is ordered to be sold by you, the said Marshal, after giving six days' notice of such sale, according to law. And that you have the moneys arising from such sale, together with this writ, at a District Court of the United States, to be held for the Southern District of New York, at the City of New York, on the first Tuesday of September, one thousand eight hundred and eighty-three, and that you then pay the same to the Clerk of the Court. Therefore, you, the said Marshal, are hereby commanded to cause the said steam canal boat, "Sydney," &c., so consented to and ordered to be sold, to be sold in manner and form, upon the notice, and at the time and place by law required. And that you have, and pay the moneys arising from such sale, pursuant to the aforesaid order or decree; and have you also then and there this writ.

Witness, the Honorable Addison Brown, Judge of the said Court, at the city of New York, in the Southern District of New York, this seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-three, and of

our Independence the one hundred and eighth.

SAM'L H. LYMAN,
Clerk.

E. D. McCarthy,
Proctor for Libellant.

In obedience to the above precept, I have sold the steam canal boat, "Sydney," &c., and such sale amounts to twenty-one hundred dollars, which sum, after deducting my costs and disbursements, amounting to $\$166\frac{84}{100}$, I have paid to the Clerk of this Court, as I am above commanded.

Dated this third day of May, 1884.

JOEL B. ERHARDT,
U. S. Marshal.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

in Admiralty.

Filed the third day of September, 1883.

STIPULATION FOR VALUE.

Entered into pursuant to the rules and practices of this city.

Whereas a libel was filed on the 23d day of July, in the year of our Lord one thousand eight hundred and eighty-three by the Providence Washington Insurance Company and another, against the canal boat "William Worden," impleaded

with the steam canal boat "Sydney" for the reasons and causes in the said libel mentioned; and whereas the seizure of the said canal boat "William Worden" by the Marshal under the process issued in pursuance of the prayer of the said libel, has been waived, and the value of the said canal boat for the purposes of this action has been filed by consent and in lieu of appraisement at the sum of one thousand dollars, as appears from said consent now on file in said Court; and the parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the claimant or his *sureties*, execution for the above amount may issue against their goods chattels and lands:

NOW THEREFORE, the condition of the Stipulation is such, that if the *Stipulators* undersigned shall at any time, upon the Interlocutory or final Order or Decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such Order or Decree, to Hyland & Zabriskie, *Esquires*, *Proctors* for the *Claimant* of said canal boat "William Worden" abide by and pay the money awarded by the final Decree rendered by the Court, or by the Appellate Court, if any appeal intervene, then this Stipulation to be void, otherwise to remain in full force and virtue.

CHARLES E. WAGER,
HENRY MORSE,
ALANSON MORSE.

Taken and acknowledged this
28th day of August, 1888.

DANIEL J. AUGUSTINE,
Notary Public,
N. Y. County.

Taken and acknowledged this 31st day of August, 1883, as to Henry Morse and Alanson Morse.

THOMAS M. CUTTING,
Notary Public for Erie County.

Northern District of New York. ss:

HENRY MORSE and ALANSON MORSE parties to the above Stipulation, being duly sworn, deposes and says and even for himself says that he resides in Buffalo, in the Northern District of New York, that he is worth the sum of two thousand dollars, over and above all his just debts and liabilities.

HENRY MORSE,
ALANSON MORSE.

Sworn to, this 29th day of August, 1883, before me.

THOMAS M. CUTTING,
Notary Public for Erie County,
U. S. Commissioner.

Recorded this day of September, 1883.

Approved September 3d, 1883.

E. D. McCARTHY,
Proctor for Libellants.

To the Hon. Addison Brown, Judge of the District Court of the United States, for the Southern District of New York :

The answer of Charles E. Wager, intervening for his interest as owner and claimant of the steam canal boat "Sydney," and the proceeds of her sale in the registry of this Court, and the canal boat "William Worden," their tackle, &c., to the libel and complaint of the Providence Washington Insurance Company, of Providence, Rhode Island, and the Security Insurance Company, of New Haven, Connecticut, against the said steam canal boat "Sydney," and the said canal boat "William Worden," their tackle, &c., in an alleged cause of collision, civil and maritime, alleges and respectfully shows to this Honorable Court as follows :

First.—Claimant admits the allegations in the first article of said libel and complaint contained.

Second.—Claimant admits that at the time of the filing of the libel and the seizure of said steam canal boat, she was in the harbor of New York, and that at the time of the filing of the libel, and the bonding thereunder the said canal boat "Worden," was also within this district, and that both vessels were within the territorial jurisdiction of this Court.

Third.—Claimant admits that, at the times alleged in the libel, he was the owner of the said steam canal boat "Sydney," and the said canal boat "Worden," and that said vessels were engaged in the business of common carriers to and from the cities of Buffalo and New York, by the way of the Erie Canal and the Hudson river. Claimant admits that the said canal boat "Wm. Wor-

den," and said steam canal boat "Sydney," left the Port of Buffalo for the Port of New York about the 18th day of May, 1883, and the "Worden," had on a cargo of seventy-nine hundred bushels of wheat of the value of nine thousand two hundred and eleven $\frac{75}{100}$ dollars, and that the said steam canal boat "Sydney," had on a cargo of seven thousand eight hundred bushels of corn. Claimant admits that the said cargo of wheat on the said boat "Worden" was consigned to Armour, Plankinton & Company of New York, but denies that the said cargo of corn on board the "Sydney" was consigned to said Armour, Plankinton & Company, and alleges that the cargo on the said steamboat "Sydney" was consigned to other parties in New York.

Claimant denies that the two said vessels were or are practically one vessel, and alleges that the two said vessels are practically and in every particular, separate, distinct and independent vessels, and that the said steam canal boat "Sydney" had the said canal boat "Worden" in tow, and that the relation of the two vessels was that which exist under the ordinary towage contract between a tow-boat and her tow, and that the only difference between the said two vessels and other tow-boats, and their tows was, that the said steam canal boat "Sydney," for convenience and safety of navigation, placed the "Worden" ahead of her, and propelled her in that manner rather than astern on a hawser or close up or alongside.

Claimant admits the two vessels were fastened together as set forth in the libel and complaint, and that the "Sydney" furnished the motive power, and that the said boat "Worden" was without masts, sails, or any motive power, and

was entirely under the control and management of the said steam canal boat "Sydney" at the time of the occurrence of the damages set forth in the libel.

Fourth.—Claimant admits that the said steam canal boat "Sydney," and her said tow, the said canal boat "Worden," proceeded from the port of Buffalo with said cargoes, on the date above mentioned, and proceeded with safety until they arrived at Troy, N. Y., when by reason of being about to enter the Hudson river, and as a matter of precaution, claimant caused the boiler on said steam canal boat to be thoroughly examined and repaired and tested, and then proceeded on and entered the river, and proceeded with safety till about 12 o'clock at night on the 29th day of May, at which time said "Sydney" and her said tow had arrived at a point in the river about one mile below Esopus light, when, without any warning, and when the said steam canal boat "Sydney" and her tow were proceeding in the channel at a proper and safe distance from Esopus Island and the opposite shore, going to the westward of the island, the under flues under the boiler of said steam canal boat "Sydney" suddenly burst, and the steam dropped from sixty five pounds to twenty-five as shown by the indicator. That thereupon the steamer was unable to keep her course, by reason of want of sufficient power to give her steerage way, and the said boat "Worden," struck the rocks on the north end of the island, and sunk in the manner and under the circumstances hereinafter set forth, and not otherwise. Claimant denies that said collision of said boat "Worden" with the rocks and the sinking thereof, were occa-

sioned through any fault, negligence, inattention or want of care or skill on the part of any person or persons, and especially denies that it was occasioned by the negligence, mismanagement or want of care or skill on the part of the said tow-boat "Sydney," her captain and crew, and alleges that the said collision with the rocks, and sinking of the said boat "Worden," and her cargo were unavoidable and uncontrollable contingencies, as hereinafter more fully set forth, and not in any way attributable to any lack of forethought, care, prudence, skill or seamanship on the part of the claimant, and the captain and crew of said steam canal boat "Sydney," or the claimant and the crew of the said canal boat "Worden." That the said island and rocks are well known, and except in cases and under contingencies and circumstances such as hereinafter set forth, are easily avoidable by tow boats and their tows.

Fifth.—Claimant denies that on the 17th day of May, 1883, or at any other time, the libellants herein did insure, by one certain policy, or any other policy of insurance, and thereby agreed to indemnify the aforesaid Armour, Plankinton & Co., the owners and consignees of said cargo of wheat, against the usual marine risks and perils of the voyage from Buffalo to New York. Claimant denies that, pursuant to such policy as set forth in the libel and complaint herein, or any other policy the said Armour, Plankinton & Co. abandoned to the libellants herein, the said cargo of wheat as, or for a total loss, or in any way whatsoever, abandoned the said cargo of wheat to the libellants, or their servants or agents. Claimant further denies that he has any knowledge or information sufficient

to form a belief as to whether the libellants herein paid to said Armour, Plankinton & Co. said sum of $9,211\frac{25}{100}$, and therefore leaves the libellants to such proof thereof as they may be advised.

Claimant further alleges that if the libellants have paid such sum for the loss of said cargo, it has been paid under the policies and certificates hereinafter particularly referred to, and for the benefit and to the credit of claimant, and not otherwise, as hereinafter particularly set forth. Claimant denies that the libellants herein, by reason of the payment of the said sum of $9,211\frac{25}{100}$, or any other sum for the loss of said cargo of wheat in the premises, became subrogated to the rights and claims and demands of the said Armour, Plankinton & Company for the loss of said cargo, or became subrogated to the rights of any other person whatsoever, or to any rights of any nature whatsoever against this claimant or the said steam canal boat "Sydney," or the canal boat "William Worden," or against any other person or thing.

Sixth.—Neither admitting or denying the jurisdiction of this Court, claimant denies each and every the other allegations in said libel contained, not hereinbefore specifically admitted or denied, and for a further answer herein alleges:

Seventh.—That your claimant loaded on the boat "Worden," under the usual bill of lading, a cargo of wheat at the port of Buffalo, N. Y., consigned to the port of New York, which bill of lading will be produced on the trial of this suit and about the same date, to wit, the 17th day of May, 1883, your claimant loaded the steam canal boat "Sydney" at Buffalo, under the usual bill of lading, a cargo of corn consigned to New York; that thereupon the

steam canal boat "Sydney" took the said boat "Worden" in tow to tow her to New York, and proceeded with said boat with safety till she and the boat "Worden" arrived in Troy, New York. That at Troy the boiler of the steamer was thoroughly examined and repaired and tested by competent machinists before proceeding into the Hudson river. That after such examination and repairs and tests your claimant proceeded on the voyage with safety and without any mishap or accident or trouble, until said steam canal boat and tow arrived in the said river off Esopus light, about 12 o'clock in the night of May 29th, 1883 That then and there, and while the said steamer and her tow were proceeding in the regular and usual channel and at a safe distance from said island and the opposite shore, and while your claimant and two other hands were on duty, without any warning, the under flues of the boiler of said steamer "Sydney" suddenly burst and the steam suddenly fell from about sixty-five pounds to twenty five pounds, as was shown by the indicator and by the slowing down of the speed of the steamer. That thereupon the said steam canal boat became unable to manage herself and tow, and by reason of the tide running full ebb with a heavy west wind and the water by reason of a freshet being two feet higher than usual, the said steam canal boat and "Worden" were carried sideways and eastward over toward Esopus Island, and when claimant observed that said boat and tow were being carried as above toward said Island, reversed the engine and commenced backing with all the power that could be got up, and thereby cleared the steam canal boat from striking the rocks. That everything was done that could be done by claimant and crew of said

steam canal boat to prevent and avoid said collision. That the said collision with said rocks of the boat "Worden" and the sinking thereof was wholly occasioned by reason of the bursting of the flues of the boiler of the said steamboat "Sydney," and not by or through any fault, negligence, inattention or want of care, forethought, skill, or seamanship on the part of your claimant, the captain and crew of said boat "Sydney."

Eighth.—That at the time and before the said collision, the said steam canal boat was well and properly manned, and before the bursting of said flues of the boiler as aforesaid, said steam canal boat was well fitted, tackeled, and equipped and in every particular seaworthy and fitted for the business in which she was engaged, and before and at the time of said collision, the captain, your claimant, and two of the crew, were up and on duty and properly stationed, and your claimant was on the lookout.

Ninth.—Claimant further answering, here alleges that he paid the premium for the insurance on the cargo of wheat lost on the boat "Worden," and that such premium was paid by him to insure him against his liabilities as a common carrier, and that such premium was paid by him and his agents and servants, with a distinct understanding and agreement with the shippers of said cargo of wheat, and the libellants, that in case of any loss or damage to said cargo while *in transitu*, the payment of such loss or damage by the Insurance company, should be for and accrue to the benefit of your claimant, and to relieve your claimant from his liability for such damage and losses as a common carrier.

That claimant paid such premium with the knowledge and consent of the libellants, their agents, servants and employees, and in accordance with the well established customs and practices now existing and having existed for twenty years past in the port of Buffalo, N. Y., between the libellants and other insurers and common carriers, whereby common carriers insured themselves against losses under and by virtue of their liability as common carriers for damages and losses to the cargoes shipped on board their boats.

That all and singular the premises are true.

Wherefore the claimant and respondent prays that this Honorable Court will be pleased to pronounce against the libel aforesaid and to condem the libellants in cost and otherwise, right and justice to administer in the premises.

C. E. WAGER.

Sworn to before me, this 7th day of September, 1883.

DANIEL J. AUGUSTINE,
[L. S.] Notary Public,
N. Y. Co.

HYLAND & ZABRISKIE,
Procs. for Claimant and Respondent,
30 Park Place,
N. Y. City.

At a stated Term of the Circuit Court of the United States of America for the Southern District of New York, held at the United States Court Rooms in the City of New York, on the 28th day of March, 1887.

Present:

The HONORABLE WILLIAM J. WALLACE,
Circuit Judge.

The PROVIDENCE WASHINGTON INSURANCE COMPANY, of PROVIDENCE, RHODE ISLAND and the SECURITY INSURANCE COMPANY, OF NEW HAVEN, CONNECTCUT,
Libellants and Appellants,

vs.

The STEAM CANAL BOAT "SYDNEY," her Engines, &c., and the CANAL BOAT "WILLIAM WORDEN," her Tackle, Apparel, &c., whereof CHARLES E. WAGER is
Claimant and Appellee.

} Decree.

This cause having been heard upon the appeal of the libellants from the decree of the District Court of the United States for the Southern District of New York, upon the pleadings and proofs in said District Court, and the additional testimony taken in this Court on said appeal; and having been argued and submitted by the advocates of the

respective parties, and due deliberation being had in the premises.

It is now Ordered, Adjudged and Decreed by the Court that the said decree of the District Court be and the same is hereby in all things reversed with costs in both Courts, and that the libellants recover in this action against the steam canal boat "Sydney" her engines, &c., and the canal boat "William Worden" her tackle, apparel and furniture the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars ($6,175.89) with interest thereon from May 18th, 1883, to the date of this decree, amounting to the sum of one thousand four hundred and twenty $\frac{30}{100}$ths dollars ($1,420$\frac{30}{100}$) together with the sum of six hundred and fifty-six $\frac{28}{100}$ dollars (656\frac{28}{100}$) costs as taxed in this Court, and in the said District Court, amounting in the aggregate to the sum of eight thousand two hundred and fifty-two $\frac{47}{100}$ dollars ($8,252$\frac{47}{100}$), and that the said steam canal boat "Sydney" her engines &c.. and said canal boat "William Worden" her tackle, apparel and furniture be condemned therefor.

And whereas, on the 25th day of July, 1883, the said steam canal boat "Sydney" then being in the custody of the Marshal of the United States District Court, Southern District of New York, pursuant to process duly issued in behalf of the libellants in this action, was, by order of said District Court, duly sold by said Marshal at public sale, and the proceeds of such sale, to wit, the sum of $2,100 was by the said Marshal paid into the registry of the Court.

And whereas, the value of said canal boat "William Worden," after process duly issued against her, was fixed by consent at the sum of $1,000 for

which the usual stipulation for value was duly given. Now, therefore,

It is further ordered, adjudged and decreed, that the proceeds of the sale of the said steam canal boat "Sydney," together with the interest thereon which has accrued since the same was deposited in the registry of the Court, be paid over to the libellants herein, or to their proctor, Edward D. McCarthy, Esq., (after first deducting the fees of the officers of the Court) towards the satisfaction of this decree, unless an appeal be allowed, taken and perfected within forty-five (45) days from the date of this decree.

It is further ordered, adjudged and decreed, that unless such appeal be allowed and perfected within said time, the stipulators for costs, and for the value of the canal boat "William Worden," filed on behalf of the claimant in this action, cause the engagement of their stipulations to be performed or to show cause before this Honorable Court within four days after the expiration of said date of appeal, (and after the service of a copy of this decree upon the proctors for said claimant), or upon the first day of jurisdiction thereafter, why summary judgments should not be entered against them and libellants and appellees have execution towards the satisfaction of this decree.

WILLIAM J. WALLACE.

SUPREME COURT OF THE UNITED STATES.

The PROVIDENCE AND WASHINGTON INSURANCE COMPANY, of Providence, Rhode Island, and The SECURITY INSURANCE COMPANY of New Haven, Connecticut,

Libellants and Appellees,

vs.

The STEAM CANAL-BOAT "SYDNEY" her engines etc. and the CANAL-BOAT "WILLIAM WORDEN" her tackel apparel, etc., whereof CHARLES E. WAGER is

Claimant and Appellant.

To the Honorable the Supreme Court of the United States:

The petition and appeal of Charles E. Wager, the claimant and appellant above named, respectfully showeth:

That on the 23d day of July, 1883, the libellants herein filed their libel in the District Court of the United States for the Southern District of New York against the above named vessels, claiming nine thousand, two hundred and eleven $\frac{75}{100}$ dollars in an alleged cause of collision, civil and maritime, and to which libel the appellant refers for further particulars.

That process was duly issued by said District Court, and the said vessels attached thereunder and thereafter the said canal-boat "William Worden" was bonded in the sum of one thousand dollars, her value having been fixed at that amount by consent, for which the usual stipulation for value in that sum was duly given.

That on or about the 25th day of July, 1883, the said steam canal-boat "Sydney" then being in the custody of the U. S. Marshal for the Southern District of New York, pursuant to said process, was, by order of said District Court, with the consent of her owner, this appellant, duly sold by said Marshal at public sale and the proceeds of said sale, to wit: the sum of two thousand, one hundred dollars was by the Marshal paid into the registry of the Court.

That on or about the 10th day of September, 1883, this appellant, having given the usual stipulation for costs, filed in the office of the clerk of the said District Court his answer to said libel, praying that the same be dismissed with costs, as by reference to said answer will more fully appear.

That the said cause came on to be heard before honorable Addison Brown, Judge of the said District Court, on the 6th, 7th and 8th days of January, 1885, upon the pleadings herein and the proofs adduced on behalf of the libellants and claimants, and argument had thereon, and the said cause having been submitted on the last named day, the said District Court Judge did, on the 18th day of February, 1885, make a final decree or sentence in favor of said claimant herein, dismising the said libels with costs, as by a reference to the said decree will more fully appear.

That after the entry of such final decree an ap-

peal was taken to the Circuit Court of the United States for the Southern District of New York by the said libellants, and the said cause was removed thereby to the said Circuit Court, upon the pleadings and proofs in the District Court and additional proofs taken in the Circuit Court, and such proecedings were had in the said Circuit Court that on or about the 30th day of March, 1887, a final decree was entered in said Circuit Court, bearing date March 29, 1887, whereby it was ordered, adjudged and decreed, amongst other things, that the said decree of the District Court be in all things reversed, and that the libellants herein recover the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, with one thousand four hundred and twenty $\frac{30}{100}$ dollars interest, together with six hundred and fifty-six $\frac{28}{100}$ dollars costs as taxed in said Circuit and District Courts, amounting in the aggregate to the sum of eight thousand two hundred and fifty two $\frac{47}{100}$ dollars, and that the above named vessels be condemned therefor, as by reference to said decree will more fully appear.

And your appellant is advised and insists that said decree is erroneous, inasmuch as he is entitled to have said libel dismissed with costs in the said District and Circuit Courts and this Court: whereupon appellant, for these and other reasons, appeals to the Supreme Court of the United States from each and every part of the said decree of the Circuit Court, and on the said appeal intends to seek a decision on the facts and pleadings in the Circuit Court and proofs to be adduced in the Supreme Court.

And your appellant insists amongst other things that he was the party insured, or one of the parties

insured, under the policies of insurance referred to in the libel herein, or entitled to the benefit of such insurance, and that the damage and loss referred to in said libel were not occasioned by any fault or negligence on the part of your appellant or the master and crew of either of said vessels and that libellants, having paid the loss under said policies of insurance, cannot now claim that said loss was occasioned by any negligence on the part of your appellant or the master and crew of either of said vessels.

And your appellant respectfully prays that the said decree of the said Circuit Court and the libel, answers, orders, proofs, proceedings, findings, exceptions, bill of exceptions and all other papers appertaining thereto in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause over, and that the said decree of the said Circuit Court may be reversed and the libel herein be dismissed with costs in this Court and the Courts below or such other decree made as to the said Supreme Court shall seem just.

Dated May 16th, 1887.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant,
30 Park Place,
N. Y. City, N. Y.

The above appeal from the said final decree of the Circuit Court of the United States for the Southern District of New York to the Supreme Court of the United States is allowed as prayed for.

Dated May 16th, 1887.

SAMUEL BLATCHFORD,
Associate Justice of the Supreme
Court of the United States.

United States Supreme Court,

No. 1213.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, et al,

Libellants and Appellees,

vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,

Claimant and Appellant.

Affidavit of J. A. Hyland in Opposition to Motion to Dismiss Appeal.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant,
No. 45 Broadway, New York City.

C. B. Merwin, Printer, 218 Fulton Street, N. Y.

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SUPREME COURT OF THE UNITED STATES.

The Providence Washington Insurance Company, et al.,
Libellants and Appellees,

vs.

The Steam Canal Boat "Sydney," &c., Charles E. Wager,
Claimant and Appellant.

STATE OF NEW YORK.
SOUTHERN DISTRICT OF NEW YORK. } ss:

J. A. Hyland, being duly sworn, deposes and says that he is one of the proctors for the claimant and appellant in the above entitled suit. That, when the libel was filed in the District Court of the United States for the Southern District of New York, deponent was retained and duly appeared as the proctor of record in said Court for this appellant. That the claim, answer and stipulation, filed in said Court by the appellant, were prepared by deponent, and were signed and sworn to by Charles E. Wager, the appellant. That at the time of filing said claim, answer and stipulation, Charles E. Wager, the claimant and

SUPREME COURT OF THE UNITED STATES.

The Providence Washington Insurance Company, et al.,
Libellants and Appellees,

vs.

The Steam Canal Boat "Sydney," &c., Charles E. Wager,
Claimant and Appellant.

STATE OF NEW YORK.
SOUTHERN DISTRICT OF NEW YORK. } ss:

J. A. Hyland, being duly sworn, deposes and says that he is one of the proctors for the claimant and appellant in the above entitled suit. That, when the libel was filed in the District Court of the United States for the Southern District of New York, deponent was retained and duly appeared as the proctor of record in said Court for this appellant. That the claim, answer and stipulation, filed in said Court by the appellant, were prepared by deponent, and were signed and sworn to by Charles E. Wager, the appellant. That at the time of filing said claim, answer and stipulation, Charles E. Wager, the claimant and

appellant herein, was the owner of said steam canal-boat "Sydney" and said canalboat "William Worden." That thereafter, on the trial in the Circuit Court of the United States for the Southern District of New York, the appellant, Charles E. Wager, was sworn and examined by deponent as a witness in his own behalf, on or about the 13th day of May, 1886. In that examination, the appellant, Charles E. Wager, swore as follows:

"Q. Mr. Wager, you are the claimant in this case?

A. Yes.

Q. And you were the captain of the boat 'Sydney' at the time of this disaster?

A. Yes.

Q. And commanded both boats coming down the river?

A. Yes, sir," (fol. 184, p. 46, Additional Testimony taken in behalf of Claimant in Circuit Court.)

"Q. When did you buy this boat or get her?

A. I bought this boat in September; I have it on my book here (witness looks at book,) November, 1882.

Q. From whom did you buy her?

A. From Gillespie" (fol. 210, p. 53, Claimant's Additional Testimony.)

The learned Circuit Judge Wallace found, as a matter of fact, that "At the time of making application for the insurance, receiving the certificate and signing the usual bills of lading, it was understood between Morse & Company and the claimant that the latter" (that is, Capt. Charles E. Wager, the appellant) "owned the 'Worden' and the 'Sydney' and intended to tow the 'Worden' by the 'Sydney' on the voyage" (Judge Wallace's Opinion, Finding Seventh.) That the stipulation hereto annexed, marked Exhibit "A," and made a part of this affidavit, was duly entered into be-

tween the proctors of the respective parties, in which it is admitted that the appellant, Charles E. Wager, was the sole owner of the said boats "Sydney and "William Worden" during the voyage referred to in the libel herein and at the time of the alleged collision. That the appeal to this Court was duly taken and allowed, and the notice and petition of appeal duly filed within the time prescribed by law and the consents of libellants' proctors, and that the bond on such appeal was duly given and filed, and approved by Mr. Justice Blatchford, of this court, and the usual citation and supersedeas issued thereon by said Justice, all of which were duly served on libellants' proctor, within the time prescribed by law, and which now remain on record in this court.

J. A. HYLAND,

Subscribed and sworn to before me this 18th day of November, 1887.

DANIEL J. AUGUSTINE,
[seal] Notary Public,
N. Y. Co.

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JAMES H. MCKENNEY,
CLERK

UNITED STATES SUPREME COURT.

No. 1213.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, *et al.*,

Libellants and Appellees,

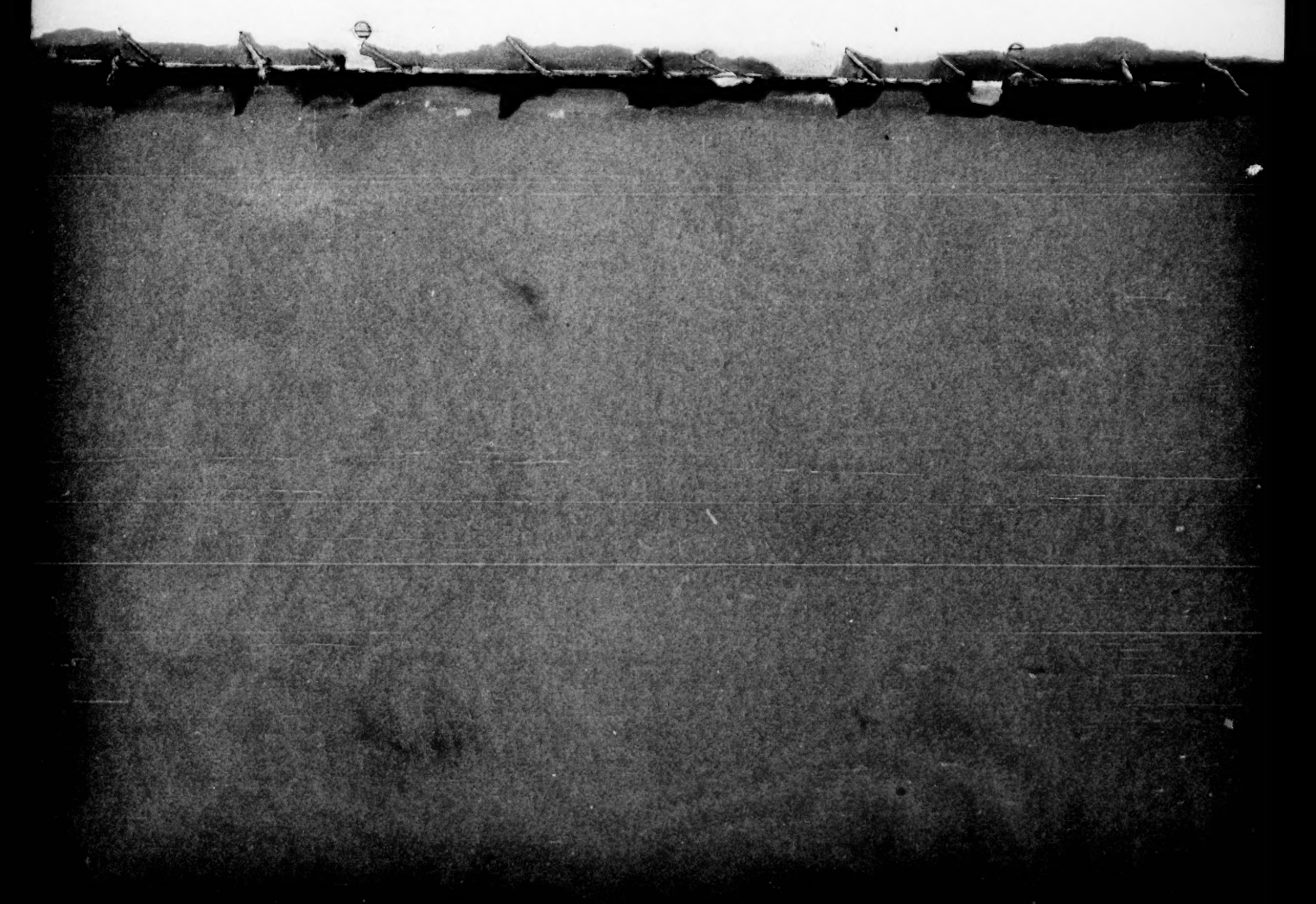
vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,

Claimant and Appellant.

BRIEF ON BEHALF OF APPELLEE ON MOTION TO DISMISS APPEAL.

EDWARD D. McCARTHY,
Proctor, Etc.
50 Wall Street, New York



SUPREME COURT OF THE UNITED STATES.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*,
Libellants and Appellees,

vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,
Claimant and Appellant.

Libellants' brief on motion to dismiss appeal for want of jurisdiction on the ground that the matter in dispute is less than $5,000.

This proceeding was taken, originally, in order to enforce a maritime lien in favor of the libellant against two vessels, the steam canal boat Sydney, and the barge Wm. Worden.

The libel made no personal demand against the owner, or owners, of these vessels.

After process had been issued, one of them, the Sydney, was sold by order of Court, and the proceeds of the sale, were deposited in the official register. They were twenty-one hundred dollars.

At, or nearly at the same time, a stipulation for

the value of the boat Worden was given, and accepted. The amount of this stipulation was one thousand dollars.

The aggregate value of the property proceeded against, and the amount for which, and for no more than which, a lien could be enforced was thirty-one hundred dollars, in other words, the libellant, if successful, could recover no more than thirty-one hundred dollars in this suit.

The Circuit Court gave judgment in favor of the libellant, and pronounced for the condemnation of the vessels ; or, what amounted to the same thing, it required the stipulators to fulfil their promise, and the register to pay over the sum deposited.

The libellants' damages actually amounted to 6,175 dollars, which is twice the aggregate value of the two vessels, and the Circuit Court gave formal judgment for that sum.

But this judgment was, and is, of no worth to the libellants, beyond the sum of thirty-one hundred dollars.

They can recover, in this proceeding, no more than thirty-one hundred dollars.

For the residue, they will have to bring an action against the person, whose negligence was the proximate cause of their loss.

On this motion to dismiss, the Libellants say that the Court has no jurisdiction, because the amount involved in this controversy, is less than that fixed by law.

The Appellant says that the Court has jurisdiction, because the judgment appealed from, will estop him from denying liability in any action that may, hereafter, be taken against him.

(I.) Upon the face of the record, the amount in

controversy is less than five thousand dollars. The Libellants could not have gained, nor the Claimant have lost five thousand dollars, on any turn of the case.

All that the Libellants asked for was the condemnation, and sale, of the two vessels; and the payment to them of the proceeds. This is all that they got by the final decree, or could have got.

Elgin *vs.* Marshall, 106 U. S. R., 578.

(II.) The fact that the Libellants' damages are greater than the present recovery, does not increase the amount involved in this controversy; because, in order to obtain such damages, a new action would have to be brought.

Within the rule laid down in "Elgin *vs.* Marshall," and the cases there cited, this new action would involve a new controversy.

In either case, its own record, only, could be read, in order to determine the amount at stake.

It does not change the rule, that the record in one action could be used as an estoppel, in the other action.

This consideration is fully presented in the opinion in "Elgin *vs.* Marshall," and it is needless to dwell upon it further.

(III.) The right of appeal is, and must be, reciprocal between adverse parties to an action. No statute will be so construed, in the absence of a clear expression *contra*, as to give one party so great a favor, if it is not given to the other.

Now it is clear, and would have been so, prior to the leading case of "Elgin *vs.* Marshall," that the Libellants could not have appealed to this Court, from a judgment of dismissal of their libel.

(I.) Their action sounds in tort, and, assuredly, is brought to recover damages. But damages, distinctively, are not claimed; neither is any demand made against any person.

(II.) The libel simply asserts a maritime lien against certain vessels, and asks for their condemnation. The condemnation of the vessels would have been a legal satisfaction of the Libellants' claim.

In case of dismissal, therefore, how could the Libellants show that more than five thousand dollars had been in controversy?

Not by their written declaration, because this does not claim damages against any one, neither could it have been the foundation of any personal judgment. (Hence, the rule that, in actions of tort, the amount claimed in the declaration will determine jurisdiction on plaintiff's appeal, does not apply).

They could have resorted only to the ascertained, or the ascertainable, value of the property attached, and sought to be condemned. This value would have been only thirty-one hundred dollars.

If the Libellants had urged, further, that a personal right arose from the same facts, and that the assertion of this right would be estopped by the record of dismissal, the answer would have been, *non constat.*

The libel might have been dismissed because there was no lien, or because the Admiralty Court had not jurisdiction.

Moreover, the libel had contained no allegations respecting the ownership of the vessels attached,

either at the time of loss, or at the time process was asked for.

The Jessie Williamson, 108 U. S. R., 310.

The record of dismissal, would not, therefore, have estopped the Libellants from bringing a personal action.

(IV.) The case of the Jessie Williamson, (108 U. S. R.), affirmed the case of Elgin *vs.* Marshall, and dismissed a libel which demanded more than five-thousand dollars *in rem*, because the subject of attachment was only worth two thousand one hundred dollars, and, consequently, the stipulators, whose undertaking took the place of the property condemned, were only liable to this extent.

There, as well as here, "no allegation is in the "libel as to who were the owners of the vessel at "the time of the collision, and nothing is set forth "therein as a foundation for any ultimate recov- "ery against any particular persons, as such per- "sons, of so much of the $27,000 claimed, as may "exceed the value of the vessel." *Ib.* 311.

"The liability of the claimants would not be "established in any case, but one where the claim- "ants were alleged and shown to have been the "owners of the vessel sued at the time of the col- "lision." *Ib.* 310.

If there be the slightest discrepancy between these two opinions in the statement of the rule applicable to the question, (which I do not suggest), nevertheless, either case is authority for the dismissal of this appeal.

(V.) But the Appellant will reply, that, in his

answer to the libel, he admits he was the owner of the vessels proceeded against.

He will, therefore, contend, that this judgment *in rem* might have "probative force" against him, in any subsequent action, *in personam*; that this record, when offered, will stop him from showing that he was free from fault, and is free from liability.

On the authority of "Elgin *vs* Marshall," it is clear that this argument, if sound, does not make for jurisdiction.

"In our opinion, sects. 691 and 692 Rev. Stat. "which as amended by sect. 3 of the act of Feb- "16. 1875, c. 77, limit the jurisdiction of this "Court, on writs of error and appeal, to review "final judgments in civil actions, and final decrees "in cases of Equity and of Admiralty and Mari- "time jurisdicti on, to those where the matter in dis "pute, exclusive of costs, exceeds the sum or "value of $5000, have reference to the matter which "is directly in dispute, in the particular cause in "which the judgment or decree sought to be re- "viewed, has been rendered, and do not permit us "for the purpose of determining its sum or val- "ue, to estimate its collateral effect in a subsequent "suit between the same or other parties" *Ib.* 579, 580,

"It would be, clearly, a violation of the rule, "to add to the value of the matter determined any "estimate in money, by reason of the probative "force of the judgment itself in some subsequent "proceeding." *Ib.* 580, 381.

In the case thus cited, it was conceded, that the judgment, appealed from, was an estoppel against the plaintiff, and would have conclusive "probative force," against him, in subsequent proceedings. Nothing more can be said

in respect to the decree from which this appeal has been taken.

But on the authority of "The Jessie Williamson," I deny that this judgment would be an estoppel against the Appellant, though he were sued *in personam:*

(I.) The libel contains no allegations of ownership of the offending vessels, it lays no foundation for any subsequent proceeding, *in personam*; it tenders no issue respecting ownership; its only purpose is the condemnation of the vessels.

(II.) Although the answer says, that the claimant was the owner of the boats "at all the times mentioned in the libel," it does not, therefore, lay any foundation for subsequent proceedings, within the rule of the authority last cited.

A defendant can not, by an admission, thus make an issue. The Libellants, at no time, made any use of this admission. It can not be said, that, either in this suit, or by any subsequent one, they have sought to hold the Claimant to liability.

His admission was a superfluous, immaterial allegation, which did not harm the libellants, and did not benefit himself.

(III). Because this admission was superfluous the claimant would not be estopped, if he were sued *ex eadem causa*, from showing that it was untrue.

Neither words nor acts, however false, will estop their author from showing the truth, if they have not been done, or spoken, to the prejudice of his adversary.

Dazell *vs.* Odell, 3 Hill, 321.

Therefore, this record could not have "probative force," in a personal action between the

Libellants and the Claimant; because, it shows an exclusive proceeding *in rem*.

(IV). It is needless, after citing these two leading cases, to go a word further; because, they cover the field of contention.

But I will take the liberty to suggest, that no record of judgment of condemnation *in rem*, can be an estoppel, under the plea of former adjudication, against evidence in a suit *in personam*.

What was said on this point, in the case reported in 108 U. S. R. was *obiter*, because that appeal was dismissed.

EDWARD D. McCARTHY,
Proctor of Libellants and Appellees,
50 Wall st., New York.

United States Supreme Court,

No. 1213.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, et al,
Libellants and Appellees,

vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,
Claimant and Appellant.

Brief on Behalf of Appellant in Opposition to the Motion to Dismiss Appeal.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant,
No. 45 Broadway, New York City.

C. B. Merwin, Printer, 318 Fulton Street, N. Y.

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vs.

THE STEAM CANAL BOAT "SYDNEY," &c., CHARLES E. WAGER,
Claimant and Appellant.

Brief on Behalf of Appellant in Opposition to the Motion to Dismiss Appeal.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant,
No. 45 Broadway, New York City.

C. B. Merwin, Printer, 218 Fulton Street, N. Y.

SUPREME COURT OF THE UNITED STATES.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, et al.,
Libellants and Appellees,

vs.

The Steam Canal Boat "Sydney," &c., CHARLES E. WAGER,
Claimant and Appellant.

Appellant's brief in opposition to the motion to dismiss appeal for want of jurisdiction.

The libel herein was filed in the District Court of the United States for the Southern District of New York, July 18th, 1883, whereupon the appellant, as master and owner of said steamboat, appeared and filed claim thereto, as owner, and made answer to the libel. Under orders duly filed in the U. S. District Court for the Southern District of New York, the

said steam canal boat "Sydney," was sold by the marshal and the proceeds thereof, two thousand one hundred dollars, were paid into the registry of said Court, to abide the event of this suit, and a stipulation for one thousand dollars, the agreed value of the said boat, "Worden," was duly filed in said court by the appellant, making the value of the *res* libelled herein, as found by sale and agreement, three thousand one hundred dollars. Thereafter the cause was tried in the District Court and a decree entered dismissing the libel. Thereupon the libellants appealed to the Circuit Court of the United States for the Southern District of New York; and therein the decree of the District Court was reversed and a decree entered in favor of the libellants for the sum of six thousand one hundred and seventy-five 89-100 dollars, exclusive of costs and interest. From this decree an appeal was taken to this Court and duly allowed and perfected, and the usual citation issued.

This motion is made to dismiss the appeal on the alleged ground that the matter in dispute is less than five thousand dollars, and is opposed on the ground that the value in dispute is the amount of the judgment, viz., six thousand one hundred and seventy-five 89-100 dollars, exclusive of costs.

The appellant was the sole owner of the *res.*, viz., the steam canal boat "Sydney," and canal boat "William Worden," before and at the times of the occurrence of the damages for which this suit is brought. The appellant so alleges in the claim and answer, verified by him in person (Respondent's Motion Papers, pp. 7 and 13). At the trial in the Circuit Court the appellant testified that he bought the said steamboat on Nov. 18th, 1882, and that he ran said steamboat, as owner and master thereof, from said date down to and including the times of the occurrence of the damages

for which this suit is brought (Claimant's Additional Testimony, p. 46, fol. 184, and pp. 53, 54, 55 and 56, fols. 210–225. The learned Circuit Judge finds the claimant to have been the owner (Finding Seventh).

In the stipulation between the respective proctors, filed herein on this motion, it is admitted that the claimant and appellant, Charles E. Wager, was the sole owner of the said boats "Sydney" and "William Worden," during the voyage referred to in the libel herein and at the time of the alleged collision.

This stipulation is as follows: "It is hereby stipulated between the proctors for the respective parties herein, that the following papers be printed on the motion of proctor for the appellees to dismiss the appeal to the Supreme Court in this action, viz..

I. The libel.

II. The claim of owner of the Sydney and Worden.

III. The answer of claimant.

IV. The bond for the value of the William Worden filed in the District Court.

V. The Marshall's return on the sale of the Sydney.

VI. The decree of Circuit Court.

VII. The petition of appeal to the United States Supreme Court.

It is admitted that the claimant and appellant Charles E. Wager, was the sole owner of the said boats, Syd-

ney and William Worden, during the voyage referred to in the libel herein and at the time of the alleged collision.

HYLAND & ZABRISKIE,
Proctors for Claimant and Appellant.
EDWARD D. MCCARTHY."

The appellant respectfully urges that he has been properly permitted to appeal to this Court, on the ground that, as it appears in the record that he was the sole owner and master of the said vessels at the time of the collision, and at the time of making claim thereto in the District Court, the decree in the suit *in rem* binds him personally as *res judicata*, that a libel *in personam* against him would lie to execute that decree, and that the matter in dispute in this case is not the vessels, or the existence of a lien on them, but the amount of the decree, viz: six thousand one hundred and seventy-five 89-100 dollars, exclusive of the costs of the Circuit Court.

It is respectfully submitted that under the facts stated the matter in dispute exceeds the sum or value of five thousand dollars, exclusive of costs as required by Sec. 3, Act of Feb. 16, 1875, Chap. 77, 18 Stat., 316.

"The practice of the Admiralty Court is not to render a decree in personam on a libel *in rem*, but in the case proved shows a clear right to a recovery against the person, (whether the action *in rem* is sustainable or not,) the libellant will be permitted after decree to introduce the proper allegations *in personam* and proceed thereon, and *after such steps have been taken the Court will hear and adjudicate the matter upon the proofs already before it*, or upon the hearing of such further evidence as either party may be allowed on motion or petition to introduce."

Betts' Ad. Pr., 99.

The above rule was followed by Judge Curtis in the case of the "Enterprise" (2 Curtis, 317.) The learned Judge holds that the decree in the suit *in rem* bound the claimant personally as *res judicata*; that a libel *in personam* against the claimant would lie to execute the decree *in rem*, it appearing in the record that the claimant of the vessel was the owner of her during the voyage for which the wages sued for were claimed, and that by his answer he contested in that character the right to wages. It will be remembered that the proceeds of the sale of the vessel in this case after deducting costs were thirteen 90-100 dollars. The decree however was for more than fifty dollars. An appeal was allowed to the Circuit Court on the ground that as the Court could proceed in a libel *in personam* against the claimant to execute the decree *in rem*, the matter in dispute was the decree for over fifty dollars and not the value of the *rem*, viz: thirteen 90-100 dollars, exclusive of costs. This case it is respectfully submitted is exactly in point and has not been overruled.

Rule 13 in Admiralty, under which the above suit was brought, provides that "In all suits for mariner's wages, the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or master alone *in personam*". This rule does not materially differ from Rule 15 in Admiralty, under which this suit is brought, viz: "In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*." The only difference between these two rules is that in the former the libellant may proceed against the freight with the ship and master, and in the latter against the ship and master, exclusive of freight. Therefore, in principle, the two rules are precisely alike, so far as they apply in this case; that is, in neither

case could the owner and ship be joined. Hence, it is an exactly parallel case in principle with the case at bar. *In the case at bar the appellant as owner and master can as master be joined.*

In the case of "Jesse Williamson, Jr., "(108 U. S. 311), the learned Justice Blatchford in his opinion, cites the case of the "Enterprise", and draws a clear distinction between it and the case of the "Williamson". There did not appear in the record of the Jesse Williamson "anything which could be held to establish, as against the claimants of the vessel, though they were her owners when the claim was filed, that they were her owners at the time of the collision, and so in a position to be liable to respond *in personam* for the damages suffered by the libellant, in a proper proceeding *in personam.*" The learned Justice further clearly lays down the rule of practice that, although "Rule 15, in admiralty, provides that "in all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*" this rule, as is well settled, excludes the joining in one suit of the vessel and her owners ; *but it does not prevent the introduction into the libel of allegations as to the ownership of the vessel at the time of the collision, with a view to a proceeding to obtain such ultimate relief in personam, on the basis of a recovery in rem, as the libellant may be entitled to.*"

It is, therefore, clear that the matter in dispute in this case, is the amount of the damages as found in the Circuit Court, since, upon the record, a libel *in personam* against the appellant would lie to execute any portion of the decree herein unsatisfied after exhausting the value of the *res* in court.

The learned advocate for the respondents is in error

when he says : "(1). Upon the face of the record, the amount in controversy is less than five thousand dollars. The libellants could not have gained, nor the claimant have lost five thousand dollars, on any turn of the case."

"All that the libellants asked for was the condemnation, and sale, of the two vessels ; and the payment to them of the proceeds. This is all that they got by the final decree, or could have got."

By referring to the libel and complaint of the respondents it will be observed, first: that the claim of damages is nine thousand two hundred and eleven 75-100 dollars and that the libellants ask not only that the said vessels be condemned and sold, but also that "all persons having or claiming to have any right, title or interest in the same, may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree *the payment of the claims aforesaid*, with interest and costs, and that said vessels, their tackle, etc., may be condemned and sold to pay the same, and *that your libellants may have such other and further relief in the premises as in law and in justice they may be entitled to receive.*" It follows from this prayer that the libellants have laid the foundation to take any proceeding which will enable them to procure, not only the condemnation and sale of the *res*, but the amount of their damages, viz : nine thousand two hundred and eleven 75-100 dollars.

The learned advocate for the respondents is further in error when he says : "(II) The fact that the libellants' damages are greater than the present recovery does not increase the amount involved in this controversy ; because, in order to obtain such damages, a new action would have to be brought." Under the practice in the admiralty court, on the record in this case

a new action would not have to be brought to enter judgment against the appellant *in personam*, but, upon the proper application to the Court, a decree would be entered against the appellant *in personam* and execution issue thereunder, on giving proper notice to the appellant, to satisfy any balance of judgment unpaid after exhausting the *res*. This would be in the nature of supplementary proceedings.

The learned advocate for the respondents is in error when he says that "the libellants could not have appealed to this Court from a judgment of dismissal of their libel." The rule is clear that, in actions of tort, the amount claimed in the declaration will determine jurisdiction on plaintiffs' appeal. On the record in this Court, had an objection been made to the jurisdiction of the Court in case the libel had been dismissed and an appeal taken, the libellants could clearly have argued that, as the claimant was the owner of the vessels at the time of the occurance of the injuries, he would be liable for any deficiency, after exhausting the value of the *res* in Court, and it would not lie in the mouth of the appellant to deny it, as he had set up the fact of his ownership in the answer, and had contested in that character the right to damages. Hence, under the rule laid down in the case of the "Enterprise," referred to by the learned Justice Blatchford, the respondent could have appealed in case their libel had been dismissed.

The case of Elgin vs. Marshall, cited by the learned advocate for the respondents, is clearly distinguishable from the case at bar. The amount involved in that case was nothing more or less than one thousand six hundred and sixty 75–100 dollars, interest due on coupons, detached from the bonds. Clearly, under the Statute, the Court could not take cognizance of the collateral effect of such a decision, as the bonds

themselves were not in the suit and could not be passed upon as such in the suit, and the Court was clearly right when it would not proceed in any case, unless its right and duty to do so are apparent on the face of the record.

Again, the fact that the libel contains no allegation of ownership of the offending vessels does not militate against the principle involved in the case. That would not prevent the libellants from making such amendments as would be in keeping with the facts brought out on the trial of the case, and the Admiralty Court would clearly allow the amendment of the record in conformity with the facts, in order to enable the libellants to satisfy their decree. Further, the time has not yet come for the libellants to make use of the admission of the appellantin his answer. Should the time come it is fair to presume that there would be no hesitation on the part of the respondents to take advantage of any right which the law and practice of this Court gives them. Nor was the admission that the appellant was *master* and *owner* of the boat at the time of the collision superfluous· on the contrary, it was essential to make the allegation as a fact, as it would have its weight with the Court, to show that the appellant would naturally be diligent in performing his duties, because he was interested in the outcome of the voyage as owner of the vessels.

The fact is clear, and cannot be controverted, that the respondents in this case, should they succeed, will secure a judgment for six thousand one hundred and seventy-five 89-100 dollars exclusive of costs and interest, and can, after exhausting the *res*, proceed against the appellant *in personam* for the balance of said decree. Therefore, it must be admitted that the amount involved is over five thousand dollars, exclusive of costs. The case of the "Enterprise" is exactly in